MALAYSIA BUILDING SOCIETY BHD

v.

UNIVEIN SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT4-24-808-1997]
7 JANUARY 2002

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Whether given - Bar Council Rulings 1997, Pt. H para. 19(a), (b), (c)*

CIVIL PROCEDURE: *Affidavits - Affidavit in support affirmed before filing of originating summons - Whether a nullity - Whether inadmissible - Whether decision in Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor followed*

CIVIL PROCEDURE: *Affidavits - Affidavit in support of originating summons - Charge action - Whether affidavit must state all particulars required under O. 83 r. 3(3) Rules of the High Court 1980 - Whether affidavit must also state particulars of all persons in possession of property*

CIVIL PROCEDURE: *Appearance - Appearance to charge action begun by originating summons - Whether plaintiff failed to enter appearance in breach of O. 83 r. 2(1) Rules of the High Court 1980*

MONEYLENDERS: *Charge - Security for loan - Whether unenforceable - Whether plaintiff breached provisions of Moneylenders Act 1951 - Whether exemption under s. 2A(2) applicable*

CIVIL PROCEDURE: *Estoppel - Action for moneys owing under loan agreement - Whether plaintiff estopped from proceeding with action in view of earlier moratorium granted to defendant*

LAND LAW: *Charge - Notice of default - Whether invalid - National Land Code, s. 254, Form 16D*

TORT: *Negligence - Duty of care - Mortgagee exercising power of sale - Whether mortgagee owes a duty to mortgagor to reduce debt*

CONTRACT: *Interest - Loan agreement - Whether interest excessive - Whether a penalty - Contracts Act 1950, s. 75*

CIVIL PROCEDURE: *Originating summons - Procedure by - Whether maintainable - Whether there were disputed facts*

LAND LAW: *Charge - Order for sale - "cause to the contrary" - Whether established - National Land Code, s. 256(3)*

This was the plaintiff's application for an order for sale of the defendant's properties charged to the plaintiff under a loan agreement between the parties. The defendant defaulted in the repayment of the loan and hence the plaintiff's application for sale.

The issues were: (1) whether the defendant gave notice to the plaintiff of its intention to raise the preliminary objections herein; (2) whether the affidavit in support of the plaintiff's originating summons was inadmissible as it was affirmed before the filing of the originating summons; (3) whether the plaintiff failed to enter an appearance as required under O. 83 r. 2(1) Rules of the High Court 1980 ('RHC'); (4) whether the plaintiff failed to include all the particulars required in the first affidavit filed and therefore breached O. 83 r. 3(3) RHC; (5) whether the plaintiff should give particulars of every person in possession of the charged property as required under O. 83 r. 3(4) RHC; (6) whether the plaintiff breached the provisions of the Moneylenders Act 1951; (7) whether the plaintiff was estopped from cancelling the loans and initiating the action herein in view of the plaintiff's moratorium granted to the defendant in respect of interest payments; (8) whether the plaintiff's Form 16D under s. 254 of the National Land Code ('NLC') failed to specify the breach as required; (9) whether the plaintiff, as mortgagee, breached its duty of care to the defendant mortgagor to reduce the debt by failing to collect the compensation paid by the government for the acquisition of part of the said properties; (10) whether the plaintiff's claim for interest was a penalty, excessive, unconscionable and irrecoverable under s. 75 of the Contracts Act 1950 ('CA'); (11) whether there was a dispute of facts which should not be dealt with in this originating summons; (12) whether the defendant had established "cause to the contrary" under s. 256(3) NLC.

Held:

[1] In the six or more affidavits filed by the defendant to resist the plaintiff's application herein, the defendant did not advert to any preliminary objection nor give the plaintiff any notice of the defendant's intention to raise preliminary objections. They only surfaced now in the submissions presented for the defendant, thereby springing surprises on the plaintiff. In such a situation, pt. H, para. 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given. Apart from that ruling, the courts have consistently upheld the procedure of

giving the other side notice at the earliest moment. Based on the authorities, it was adequate to dismiss the preliminary objections raised by the defendant. (pp 95 e-f, 96 c & 97 c)

[2] The plaintiff's affidavit in support affirmed on 19 November 1997 before the filing of the originating summons on 27 December 1997 was admissible. The decisions in *Arab-Malaysian Finance Berhad v. Serajudin Mohd Ismail & Anor* and *Ban Hin Lee Bank v. Pang Lai Hin* were not followed. (pp 97 d-h, 98 a-i & 99 a)

[3] Upon a careful reading of O. 83 r. 2(1) RHC, it is clear that O. 83 r. 2(2) to (7) would be applicable only where a defendant fails to enter an appearance. In the present case, the defendant had entered an appearance through its solicitors by way of a memorandum of appearance dated 22 July 1998. A notice of appointment to hear the originating summons dated 24 July 1998 was served on the defendant informing the defendant to attend the hearing of the originating summons on 24 August 1998. Learned counsel for the plaintiff and the defendant had attended subsequent hearings without fail and had indeed diligently presented voluminous written submissions. No one was deprived of the right of being heard. In the circumstances, there was no merit in the defendant's contention that the plaintiff had breached O. 83 r. 2(1) to (7) RHC. (pp 100 b, h & 101 a)

[4] Upon a proper perusal of O. 83 r. 3(3) RHC, there is strictly no requirement in law that the first affidavit must include all the particulars. The particulars under O. 83 r. 3(3) may be provided in the affidavit or affidavits before the final hearing (*Citibank NA v. Ibrahim Othman*). In the present case, the facts showed that the plaintiff had provided the statutory particulars in all the affidavits filed herein. (pp 101 b & 102 b-c)

[5] The plaintiff did not have to give particulars of every person who to the best of its knowledge was in possession of the charged property under O. 83 r. 3(4) RHC. That was because the delivery of vacant possession as prayed for by the plaintiff was not a vacant possession to the plaintiff but to the successful buyer of the properties at the auction. (pp 103 e-f)

[6] The Ministry of Housing and Local Government had by a letter dated 17 December 1996 extended the period of exemption to the plaintiff pursuant to s. 2A(2) of the Moneylenders Act 1951 for a period of 15 years from 1 January 1991 to 31 December 2005 and would gazette the exemption which had been done *vide* PU(B) 144/1997. In the circumstances, there was no contravention of any provision of the Moneylenders Act 1951 to render the loan null and void. (pp 103 h-i & 104 a-b)

[7] The moratorium on interest payment for every three months on a roll-over basis was the plaintiff's indulgence in response to the defendant's request for a six-month moratorium contained in the defendant's letter dated 3 October 1995. That indulgence certainly could not be construed as excluding the defendant's liability to perform its obligations to repay all sums under the charges. (p 105 a-b)

[8] The plaintiff's Form 16D did specify, *inter alia*, the breach alleged, *ie*, that the defendant had failed to pay the plaintiff all the sums due with interest until the date of the notices and further interest thereafter and at no time was there any reply whatsoever by the defendant to those notices. In the circumstances, the plaintiff's Form 16D notices had complied with s. 254 of the NLC. (p 105 f-g)

[9] After receiving the two Forms H dated 27 April 1996 in respect of the acquisition of part of the properties, the plaintiff had on 9 July 1996 accepted the offer for compensation but had only managed to receive the compensation on 4 February 2000. Whilst, the defendant as the registered owner took no initiative to obtain the compensation. (p 106 b-c)

[10] The plaintiff's claim for interest under cl. 3.1(a) of the charge document, *ie*, at the rate of 9.5% per annum was nothing unusual or objectionable under s. 75 of the Contracts Act 1950 as the defendant would have to pay the same to the plaintiff in any event for the loss of the use of funds disbursed to the defendant independent of any breach of contract by the defendant under the charges. In addition, the plaintiff's claim for interest over and above the said 9.5% per annum was sustainable under cl. 3.2(a) thereof as the defendant had agreed that the plaintiff might vary the interest rate or the ruling rate at any time. (pp 107 h-i & 108 a)

[10a] The plaintiff had under cl. 3(2)(c) thereof given notices of variation of interest to the defendant from time to time as was shown in its letters for the varied interests. The defendant's contention that it had no record of receipt of the notices of variation was immaterial in view of cl 3.2(c) thereof which provided that any failure by the plaintiff to give notices of variation of interest shall not prejudice or have the effect of invalidating any such variation of interest. Since the defendant had agreed to the varied interest, the question of excessive interest did not arise. (pp 108 b-d)

[10b] The decision in *Bhai Panna Singh v. Bhai Anjun Singh* wherein the Privy Council established the requirement for the plaintiff to prove the damages suffered in the context of s. 74 of the Indian Contracts Act 1782 (which is in *pari materia* with s. 75 of our Contracts Act 1950),

did not render any assistance to the defendant. It is pertinent to restate the principle that in our country there is no difference between penalty and liquidated damages. (pp 108 e-f)

[10c] The defendant's contention that the plaintiff's claim for interest was excessive and against public policy did not appear to have any merit as the said interest had been agreed by the plaintiff and the defendant which had incorporated in all the charges after proper legal advice and representation. No such complaint was raised by the defendant at the inception, approval and disbursement of the loans. (p 109 c)

[11] The defendant's submission that there was a dispute of facts which should not be dealt with in the originating summons was unmeritorious. There was not the slightest doubt that the matter before the court was a charge action praying for an order for sale, and under O. 83 r. 2(1) RHC, it might be begun by writ or originating summons. It is an established practice and procedure in our courts that charge actions are almost invariably commenced and proceeded with by way of an originating summons since such proceedings in particular the present case pertain to the construction of the charge document and this mode of commencement provides a relatively swift and simple means of obtaining relief. (p 109 d-e)

[12] In the present application for an order for sale, the burden of proof lies on the defendant to show the existence of cause to the contrary under s. 256(3) of the NLC. The defendant had done its competent best and attempted to show that there existed "causes to the contrary" and therefore an order for sale ought not to be granted. However, the court was constrained to conclude that the defendant had failed to establish any cause to the contrary. (pp 110 a & 111 f)

[Order for sale as applied for in encl. (2).]

Case(s) referred to:

Arab Malaysian Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(not foll)***

Arab-Malaysian Merchant Bank Bhd & Ors v. Court Square Pelita Sdn Bhd & Ors [2000] 1 LNS 1 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(refd)***

Ban Hin Lee Bank v. Pang Lai Hin [1999] 7 CLJ 385 ***(not foll)***

Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd [2000] 1 CLJ 766 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd [1987] 1 CLJ 383; [1987] CLJ (Rep) 486 ***(refd)***

Beng v. Sadler and Motor [1937] 2 KB 158 ***(refd)***

Bhai Panna Singh v. Bhai Anjun Singh [1929] AIR PC 179 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1997] 4 AMR 3160 ***(refd)***

Bunbury Foods Proprietary Ltd & Anor v. National Bank of Australasia Ltd & Anor [1983] 153 CLR 491 ***(refd)***

Charles Ooi Kiah Inn & Anor v. Kukuh Maju Industries [1993] 3 CLJ 199 ***(refd)***

Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(dist)***

Chuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd [1971] Ch 949 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 ***(refd)***

Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 ***(refd)***

Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases [1996] 3 CLJ 263 ***(refd)***

Datuk Ong Kee Hui v. Sinyum Anak Mutit [1982] CLJ 539; [1982] CLJ (Rep) 87 ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor [1996] 1 CLJ 141 ***(refd)***

Ee Kim Kin v. Collector of Land Revenue, Alor Gajah [1967] 2 MLJ 89 ***(refd)***

Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370 ***(refd)***

Harun Taib v. Khor Peng Song [1991] 3 CLJ 2484; [1991] 2 CLJ (Rep) 707 ***(refd)***

Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466 ***(refd)***

Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***

Keng Soon Finance Bhd v. MK Ratnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 ***(refd)***

Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 ***(refd)***

Lee Thye v. Tan Sri Ngan Ching Wen [1999] 7 CLJ 95 ***(refd)***

Letchmy Chengdam v. Salahuddin Mukhtar [1994] 2 AMR 30 ***(refd)***

Lori Malaysia Bhd v. Arab-Malaysia Finance Bhd [1999] 2 CLJ 997 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd [1994] 2 CLJ 15 ***(refd)***

Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor [2000] 3 CLJ 73 ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

OCBC Bank (Malaysia) Bhd v. Lean Seng Pottery Factory Sdn Bhd [1999] 5 CLJ 529 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***

Perwira Affin Bank Bhd v. Tan Tian Ser [1995] 2 CLJ 133 ***(refd)***

Perwira Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185 ***(refd)***
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(refd)***
Public Feedmill (M) Sdn Bhd (in liquidation) v. Hai Yeu Hin [1994] 2 CLJ 802 ***(refd)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 ***(refd)***
Raja Guppal Ramasamy v. Segaran Pakiam [1999] 2 CLJ 972 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 1 MLJ 228 ***(refd)***
Re Koh Kim Kuay, ex p MBf Finance Bhd [1995] 2 CLJ 145 ***(refd)***
Re Lee Boon Hooi, ex p Tan Ket Huat [1992] 4 CLJ 1903; [1992] 2 CLJ (Rep) 699 ***(refd)***
Realvest Properties Sdn Bhd v. The Co-operative Central Bank Ltd [1996] 3 CLJ 823 ***(refd)***
Re Mohd Sharif Sapie, ex p Malayan Bankng Bhd [1992] 2 MLJ 102 ***(refd)***
Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong [1996] 2 CLJ 960 ***(foll)***
S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1995] 2 CLJ 152 ***(refd)***
Sam Hin Timber Trading Co v. Perusahaan Sri Duyong Sdn Bhd [1983] 2 CLJ 269; [1983] CLJ (Rep) 838 ***(refd)***
Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***
Selvarani KV Velusamy v. Sundara Raja Kasamoorthie [1999] 6 CLJ 477 ***(refd)***
Shobri Hassan v. Ramalingam [1993] 1 MLJ 263 ***(dist)***
Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd [1997] 1 CLJ 590 ***(refd)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 ***(refd)***
Sogelease Advance (Malaysia) Sdn Bhd v. Jantsco Sdn Bhd & Ors [2001] 5 CLJ 536 ***(refd)***
SS Maniam v. The State of Perak [1957] 23 MLJ 75 ***(foll)***
Standard Chartered Bank Ltd v. Walker & Anor [1982] 3 All ER 938 ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor [2001] 4 CLJ 168 ***(refd)***
Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd [1986] 2 MLJ 253 ***(refd)***
Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 ***(refd)***
Tan Kai Kok v. Thor Teik Seng [1935] MLJ 91 ***(refd)***
Teoh Thean Peng v. D & C Leasing Sdn Bhd [1993] 2 CLJ 665 ***(refd)***
The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***
Theresa Chong v. Kin Khoon & Co [1976] 2 MLJ 253 ***(refd)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(refd)***
United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 ***(refd)***
Wee Wood Industries Sdn Bhd v. Guannex Leasing Sdn Bhd [1990] 2 CLJ 1060; [1990] 3 CLJ (Rep) 355 ***(refd)***

Yang Lak Man v. Yang Paw Man [1999] 7 CLJ 131 ***(refd)***
Yip Chee Seng Sons Sdn Bhd v. Ornaconstruction Corporation Sdn Bhd [1999] 6 CLJ 550 ***(refd)***
YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 6
Bankruptcy Rules 1969, r. 106
Companies Act 1965, ss. 67, 133(1), (5)
Companies (Winding-up) Rules 1972, r. 26
Contracts Act 1950, ss. 24(a), (b), (e), 25, 75
Moneylenders Act 1951, ss. 2A(2), 16, 17, 21, 22, 23,
National Land Code, ss. 254(1)(a), 256(3), 340
Rules of the High Court 1980, O. 3 r. 6, O. 56 r. 1(3), O. 83 rr. 1(1)(a), (b), (c), 2(1), (2), (3)(c), (4), (5), (6), (7), 3(3)(b), (c), (4), (6), (7)

Contracts Act [India] 1782, s. 74

Other source(s) referred to:
Chitty on Contracts, 26th edn, paras 1134, 1135, p 688
Malaysian High Court Practice, 1998 MLJ Desk Edn, para 7.1.2, p 96-110

For the defendant - Richard WG Lee; M/s Cheah Teh & Su
For the plaintiff - Wong Kian Kheong (Cheah Soo Chuan); M/s Lee Hishammuddin

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (2) for an order for sale of three pieces of properties held under No. C.T. 8150, Lot No. 167, Seksyen 63, Bandar Kuala Lumpur, Negeri Wilayah Persekutuan; Geran No. 9978, Lot No. 147, Seksyen 63, Bandar Kuala Lumpur Negeri Wilayah Persekutuan dan C.T. 14077, Lot No. 210, Seksyen 63, Bandar Kuala Lumpur, Negeri Wilayah Persekutuan ("the properties") all of which were charged by the defendant in favour of the plaintiff by way of two memoranda of charges, *vide* presentation Nos. 16320/95 and 16321/95 ("the charges"), pursuant to s. 256 of the National Land Code 1965 ("NLC") and O. 83 of the Rules of the High Court 1980 ("RHC").

Facts Of The Case

By a loan agreement dated 26 July 1995 ("loan agreement"), the plaintiff granted to the defendant two loan facilities *viz*, a term loan of RM23.5 million ("term loan") and a bridging loan of RM36.5 million ("bridging loan").

By the charges registered on 12 November 1995, the defendant charged the properties to the plaintiff, as security for the repayment of all principal sums outstanding under or in connection with the term loan and bridging loan ("the loans") together with interest thereon.

The plaintiff disbursed RM23.5 million under the term loan and RM2.3 million under the bridging loan to the defendant on 1 August 1995.

In breach of the charges, the defendant had failed to pay interest starting from the month of August 1995, as a result of which by a letter dated 3 October 1995, the defendant had, among others, applied for a moratorium on the payment of interest for six months.

By a letter dated 9 November 1995, the plaintiff rejected the defendant's said request, but instead granted an indulgence to the defendant, in that the defendant's account was allowed to be in the state of arrears of interest for a period of not exceeding three months only.

Nothwithstanding the indulgence from the plaintiff, in breach of the charges, the defendant had failed to pay arrears of interest for a period of more than three months.

By letters dated 23 January 1996, 14 March 1996 and 22 July 1996, the plaintiff had, among others, requested the defendant to update its account or to reduce the arrears in payment of interest for a period of not exceeding three months. However, the defendant had again failed to settle the arrears of interest in its account.

By two letters dated 2 October 1997, the plaintiff's former solicitors demanded for payment of the principal, interest and all other sums payable under the loans.

By two notices in Form 16D dated 17 October 1997 ("Form 16D notices"), the plaintiff called upon the defendant to remedy its default in respect of the charges. As the defendant has failed to do so, the plaintiff filed this application.

Submission For Defendant

The defendant resisted the plaintiff's application. Encik Richard W.G. Lee, learned counsel for the defendant, submitted in great detail, that there is "cause to the contrary" under s. 256(3) NLC so that an order for sale should not be granted. The lengthy submission presented for the defendant covered such areas as procedural improprieties or nullities; illegality and breach of public policy; plaintiff's premature and flawed demands in Form 16D notices; land acquisition by the government; penalty or excessive interest; and finally wrongful and excessive variation of interest.

Under the first issue relating to procedural improprieties or nullities, it was submitted for the defendant that the plaintiff's affidavit in support was affirmed before the originating summons was filed and learned counsel said he was fortified by four decisions, *viz*. *Arab Malaysian Finance Bhd v. Serajudin bin Mohd Ismail & Anor* [1999] 6 CLJ 405; *Ban Hin Lee Bank v. Pang Lai Hin* [1999] 4 CLJ 385; *Chin Yoon Timber Co. v. Overseas Lumber Bhd* [1978] 2 MLJ 173; and *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756.

He then launched a submission on the plaintiff's alleged breach of several provisions in O. 83, *viz*. r. 2(2), (3), (4) and (5); r. 3(3), r. 3(3)(b), (c), r. 3(4), r. 3(6) and r. 3(7) of the Rules of the High Court 1980 and garnered the support of *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 and *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678, 686 in respect of the interpretation of the word "must" in O. 32 r. 13(2)(b), *vis-a-vis* the interpretation of the word "must" in O. 83 r. 2(2), which he said made it mandatory for the plaintiff, not less than four clear days before the day fixed for the first hearing of the originating summons, to serve on the defendant a copy of the affidavit in support of the summons. He added that the first hearing date of the plaintiff's originating summons was 23 June 1998, the originating summons should have been served on the defendant at any time prior to 23 June 1998 but was only served sometime in July 1998. He also contended that an adjournment did not constitute an automatic extension of time for the plaintiff to comply with O. 83 r. 2(2) and relied on *Public Feedmill (M) Sdn. Bhd. (In liquidation) v. Hai Yeu Hin* [1994] 2 CLJ 802, pertaining to the interpretation of O. 56 r. 1(3).

It was further contended for the defendant that the plaintiff claiming delivery of vacant possession has failed to comply with the mandatory provisions of O. 83 r. 2(3). It was argued that other than the notice of appointment for the adjourned hearing on 24 August 1998, the plaintiff did not serve any other notice of appointment for subsequent adjourned hearings and that the plaintiff was in breach of O. 83 r. 2(4), in the absence of any direction given by the court. Further it was said that the plaintiff has failed to comply with O. 83 r. 2(5).

Learned counsel then canvassed that the plaintiff's failure to state the circumstances under which the plaintiff's right to possession arose constituted a breach of O. 83 r. 3(3). He added that the plaintiffs affidavit in support has failed to state the amount of repayments under 0.83 r3(3)(b); or the amount of any interest or instalments in arrears at the date of the issue of the originating summons and at the date of the affidavit in support, as required

under O. 83 r. 3(3)(c). He said that the plaintiff has failed to comply with O. 83 r. 3(4); r. 3(6) and r. 3(7) pertaining to stating the amount of a day's interest as the plaintiff's claim included a claim for interest.

He concluded on this issue that rules of court must be complied with and cited in support *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228 JCPC; *Raja Guppal a/l Ramasamy v. Segaran a/l Pakiam* [1999] 2 CLJ 972 CA; *Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729 SC; *S. Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1995] 2 CLJ 152, 154 HC; *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC; *Shobri bin Hassan v. Ramalingam* [1993] 1 MLJ 263 HC; *Letchmy a/l Chengodam v. Salahuddin b. Mukhtar* [1994] 2 AMR 30; 1550 HC; *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd* [1994] 2 CLJ 15 and in particular s. 256(2) of the NLC.

On the issue of illegality and breach of public policy, it was argued that the charge is null and void and unenforceable because the plaintiff which is governed by the Moneylenders Act 1951 has breached ss. 16, 17, 21, 22 and 23 thereof, and that the exemption under s. 2A(2) which has not been gazetted is ineffectual.

Defendant then relied on s. 24(a), (b) and (e) and/or s. 25 of the Contracts Act 1950 to support the contention that the charges and any guarantee and transaction thereunder are null and void and unenforceable by reason of illegality and breach of public policy, citing *Keng Soon Finance Bhd v. MK Ratnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 JCPC; *Chitty on Contracts* 26th edn. para 1134 and 1135, p. 688; *Beng v. Sadler and Motor* [1937] 2 KB 158; *Harun bin Taib v. Khor Peng Song* [1991] 3 CLJ 2484; [1991] 2 CLJ (Rep) 707 HC; *Charles Ooi Kiah Inn & Anor v. Kukuh Maju Industries (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 3 CLJ 199 SC; and *Datuk Ong Kee Hui v. Sinyum Anak Mutit* [1982] CLJ 539; [1982] CLJ (Rep) 87 FC.

The defendant complained that, in view of the plaintiff's moratorium granted to the defendant on 9 January 1995, in respect of interest for every three months on a roll-over basis, the cancellation of the bridging loan and the notices in Form 16D issued by the plaintiff on 17 October 1997 and the foreclosure action herein, claiming the full sum, including all interest as well as default interest, in total disregard to the moratorium are premature and misconceived, and that the plaintiff is estopped from both cancelling the bridging loan and initiating the action herein, relying on *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. It was further argued that the issuance of Form 16D notices and the

commencement of the action herein by the plaintiff are tainted with bad faith as the plaintiff ought not to be allowed to approbate and reprobate, or blow hot and cold. Reliance was placed on *Ee Kim Kin v. Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89, 91; and *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor* [1996] 1 CLJ 141. It was also said that the plaintiff has waived its right to cancel the bridging loan, issue Form 16D notices and initate the action herein, as the plaintiff's claim has been compromised by reason of the moratorium which satisfied the second and third limb of "cause to the contrary" as defined in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 at pp. 44-46 CA.

The next issue raised for the defendant is that Form 16D notices issued by the plaintiff were flawed as they had run foul of s. 254 of the NLC, in that the Form 16D notices for the charges, did not set out any one of the events of default listed in cl. 7.1(a)(i) to (xv) contained in the annexures to the charges. It was said that the Form 16D notice issued for presentation No. 16320/95 merely stated that the defendant was in breach of the charge provisions by failing to pay the plantiff RM26,697,812.09 as at 31 January 1997 and interest, as at the date of notice and still continuing, while that for presentation No. 16321/95 stated that the defendant was in breach of the charge provisions by failing to pay the plaintiff the sum of RM2,614,453.70 and interest as at the date of notice and still continuing. Learned counsel submitted that for the defendant to be in breach as aforesaid, there must firstly be a legal obligation on the part of the defendant to pay the plaintiff the aforesaid sums respectively before Forms 16D notices were issued. He added that there was no legal obligation on the defendant to pay the aforesaid sums to the plaintiff prior to the issue of the Form 16D notices and hence there was no breach by the defendant, in which case these notices were inherently flawed, invalid and ineffectual and so the issue of the defendant remedying the breach did not arise. He continued that the plaintiff's failure to state the amount in respect of the interest rendered the notices vague, ineffectual and void for want of compliance with s. 254(1)(a) the NLC, drawing support from the Supreme Court decision in *Kimlin Housing Development Sdn Bhd (appointed Receiver And Manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274, and that the defendant has satisfied the second and third limbs of "cause to the contrary" as defined in *Low Lee Lian, supra.*

The defendant then ventilated that the plaintiff has without any acceptable reason failed to collect the compensation paid by the government for the acquisition of part of the properties, resulting in an act of indolence, and added that a mortgagee owes a duty of care towards the mortgagor so as to reduce the debt, failing which the mortgagor's indebtedness is to be reduced accordingly in equity. *Chuckmere Brick Co. Ltd & Anor v. Mutual Finance*

Ltd [1971] Ch. 949; *Standard Chartered Bank Ltd v. Walker & Anor* [1982] 3 All ER 938; and *United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358 FC were cited in support thereof. It was argued for the defendant that if the plaintiff had collected the compensation in good time, the defendant's alleged debt would have been substantially reduced.

The issue of penalty or excessive interest was raised for the defendant, in that the plaintiff's claim for excessive interest began from 9.5% per annum in 1998 which from time to time was varied to 9.75%, 10.25%, 11.25%, 11.75%, 13%, 16.5% per annum and at present it is 10.5% per annum for the term loan and 10.25% per annum for the bridging loan, besides the additional interest at 1% per annum, which was said to constitute a penalty, excessive, unconscionable and irrecoverable under s. 75 of the Contracts Act 1950, seeking support in *Wee Wood Industries Sdn Bhd v. Guannex Leasing Sdn Bhd* [1990] 2 CLJ 1060; [1990] 3 CLJ (Rep) 355 HC; *Low Lee Lian, supra; Co-operative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 and *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v. WT Low & Ng Realty Sdn. Bhd.* [1997] 5 MLJ 185. It was further contended, that the aforesaid variation of interest is against public policy.

Finally, it was stressed that there are disputed facts which rendered the originating summons patently unsuitable, and concluded that the defendant has clearly shown "cause to the contrary", so that the plaintiff's application ought to be dismissed with costs.

Plaintiff's Case

Encik Wong Kian Kheong and Encik Cheah Soo Chuan, both learned counsel for the plaintiff, submitted that in an application for sale, the burden of proof lies on the defendant to show the existence of "cause to the contrary" under s. 256(3) of the NLC which had been given a very narrow and restrictive interpretation by the Federal Court in *Low Lee Lian, supra*. It was said for the plaintiff that since there is no "cause to the contrary", an order for sale ought to be granted.

On the preliminary objection based on procedural improprieties or nullities, it was argued for the plaintiff that the defendant has failed to give notice thereof and that the plaintiff was taken by surprise, in which case the preliminary objection should be dismissed.

In any event, it was submitted for the plaintiff that there is no requirement in law for an affidavit such as encl. (1) to be affirmed at the same time with or after the filing of the originating summons. Counsel added that such an affidavit may still be used subject to the condition that it be re-sworn and re-filed.

a It was contended for the plaintiff that O. 83 r. 2 applies only where a defendant fails to enter an appearance, but does not apply eg, where the defendant herein has entered an appearance on 22 July 1998 in encl. (5) and the plaintiff had duly served a "notice of appointment to hear the originating summons" dated 24 July 1998 in encl. (4).

b It is the plaintiff's case that there is no requirement in law that all particulars under O. 83 r. 3 must be included in the first affidavit and that the plaintiff has provided sufficient particulars in all the affidavits filed herein, thereby also complying with O. 83 r. 3(3); (6) and (7).

c On the issue of illegality and breach of public policy, it was argued for the plaintiff that the alleged breach by the plaintiff of ss. 16, 17, 21, 22 and 23 of the Moneylenders Act 1951 and ss. 24(a), (b) and (e) and 25 of the Contracts Act 1950 did not arise and did not constitute "cause to the contrary".

d It was then argued for the plaintiff that the moratorium on the payment of interest for a period not exceeding three months was only an indulgence to the defendant as the defendant was unable to pay interest from the month of August 1985 when the loan was disbursed, and that the defendant was liable to pay the plaintiff all sums secured under the charges, as the question of estoppel, approbation or reprobation does not arise.

e In relation to the alleged flaw in the Form 16D notices issued by the plaintiff, it was opined for the plaintiff that there was no obligation on the part of the plaintiff to give any reason on the principal, interest and all other sums payable under the charges and that the defendant was not prejudiced. In addition, it is

f the plaintiff's case that the plaintiff has complied with the requirements of s. 254 NLC.

On the issue pertaining to land acquisition, it was submitted that the plaintiff managed to obtain the compensation on 4 February 2000 and the delay was not due to the plaintiff's fault.

g In the plaintiff's opinion, the penalty or excessive interest is only to be paid in the event of the defendant's breach under the charges and is nothing unusual or objectionable, being outside the ambit of s. 75 of the Contracts Act 1950.

Finally, the plaintiff contended that the defendant's allegation of wrongful and

h excessive variation of interest is without merit as the charges do provide for such variation.

In the circumstances, the plaintiff prays for an order in terms of the application in encl. (2).

i

Decision Of The Court

Preamble

Defendant's learned counsel has commended himself to the mobilisation of all the provisions of procedural law relating to charge actions under O. 83, in addition to the precepts of every substantive law under the NLC and indeed every nook and corner of the law of the land, thereby leaving absolutely no stone unturned, for the purpose of avoiding an order for sale. Be that as it may, one thing is crystal clear. The initiative to apply for and obtain the approval and consequential disbursement of the loans originated from the defendant. The loans were given legal effect after the plaintiff and the defendant have sought and obtained legal advice and representation resulting in the documentation of the charges and their eventual registration.

At the time of the disbursement of the loans, there was apparent happiness all round and nothing turned on the illegality, invalidity or unenforceability of the loans. The inability of the defendant to maintain and service the loans has resulted in the heaping of the aforesaid submissions for the defendant. Nevertheless, in the light of the various issues raised for the defendant herein, it is incumbent upon this court to determine on their merits.

Preliminary Objections

It is to be noted that in the six or more affidavits filed by the defendant to resist the plaintiff's application herein, the defendant did not advert to any preliminary objection, nor give the plaintiff any notice of the defendant's intention to raise preliminary objections, which only surface now in the submissions presented for the defendant, thereby springing surprises on the plaintiff. In such a situation, part H, para. 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given. Para 19(a), (b) and (c) read as follows:

> **19. Notice of Preliminary Objections**
>
> (a) An advocate and solicitor shall give written notice, whether by letter, facsimile message or otherwise, to the advocates and solicitors representing all the other parties in the litigation, of his intention to raise a preliminary objection during the hearing of any matter before any court, tribunal or other body authorised to conduct hearings.
>
> (b) Such written notice shall be delivered to the other advocates and solicitors within a reasonable period before the hearing but not later than 48 hours before the hearing to enable the said advocates and solicitors to properly prepare themselves and to secure instructions from their clients with regard to the proposed preliminary objection.

(c) Such written notice shall set out in sufficient detail:

(i) the nature of the proposed preliminary objection;

(ii) a list of authorities that counsel moving the court for the preliminary objection intends to rely on; and

(iii) the proposed relief that counsel moving the court for the preliminary objection will seek before the court in the event that the objection is upheld by the court.

Apart from the aforesaid ruling, our courts have consistently upheld such procedure ie, in giving the other side notice at the earliest moment: per Thomson, CJ in *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] 28 MLJ 370; per Edgar Joseph Jr, J (later FCJ) in *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor.* [1985] 1 MLJ 394; per Abdul Kadir Sulaiman J (now JCA) in *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases* [1996] 3 CLJ 263.

In *Bukit Melita Sdn Bhd v. Lam Geok Hee & 7 Ors* [1997] 4 AMR 3160, one of the issues for determination revolves around the effect of the failure by the respondent's solicitor to give written notice of the preliminary objection to the appellant's solicitors. There I held as follows:

> In my considered view, it is trite law that a party who wishes to raise any preliminary objection must give written notice to the other party's solicitors as early as possible of his intention to do so. Failure to do so would amount to a waiver of the party's right to raise the objection: per Mohd Hishamudin bin Mohd Yunus JC (as he then was) in *Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237, and Edgar Joseph in *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394. It was held in these two cases that the notice of preliminary objections must satisfy two requirements, *viz*:
>
> (a) the notice must be in writing; and
>
> (b) the noice should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.
>
> It is obvious that the whole purpose of the notice is to promote good etiquette amongst members of the Bar and more importantly to remove the element of surprise. It is necessary that the party against whom an objection is intended to be raised should not be taken by surprise and that both parties are given equal opportunities to prepare their submissions in order to ventilate all the relevant issues; being forewarned is being forearmed. Although it is true to say that the element of surprise in the instant case is completely non-existent since the parties herein are given adequate equal opportunity and time to prepare their respective written submissions, it must be immediately emphasised

that the notice of objection must at all times be given to the other side. There can be no excuse for any delay, intentional or otherwise, in giving notice to the appellant.

Since the respondents' learned counsel has failed to give any prior written notice of the preliminary objection, I hold that the respondents are deemed to have waived their rights to do so. Waiver implies something in the nature of estoppel (See *Wong Chor San v. Chop Yee Kuan* [1975] 23 MLJ 68 at p. 70).

On the aforesaid authorities, I would have thought that it would have been adequate to dismiss the preliminary objections raised by the defendant's learned counsel. However, in deference to the learned counsel whose efforts have produced volumes of written submissions filed herein, I would now give my decision thereon.

Affidavit Affirmed Before Filing Originating Summons

The plaintiff's affidavit in support was affirmed on 19 November 1997 while the originating summons was filed on 27 December 1997.

In *Arab-Malaysian Finance Berhad, supra,* the affidavit in support of the originating summons was affirmed a week before the originating summons was filed. RK Nathan, J held that the said affidavit was a nullity and so inadmissible. This decision was followed by his Lordship in *Ban Hin Lee Bank Bhd, supra,* where an affidavit affirmed on 22 June 1998 in support of an originating summons filed on 24 June 1998 was again held to be a nullity and inadmissible. These two decisions were however not followed by Azhar bin Hj. Maah, J in *Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali* [1999] 6 CLJ 466 where an affidavit affirmed on 17 September 1996 in support of an originating summons filed on 25 September 1996 was held to be admissible, nor by Mohd. Hishamudin bin Mohd Yunus, J in *Yang Lak Man v. Yang Paw Man* [1999] 7 CLJ 131 where an affidavit affirmed on 8 February 1999 in support of an originating summons filed on 1 March 1999 was similarly held admissible. In *Standard Chartered Bank Malaysia Berhad v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168, on the grounds which I have given in my judgment therein, I followed *Hong Kong Bank, supra,* and *Yang Lak Man, supra,* and held that the affidavit affirmed on 4 August 1998 in support of the originating summons filed on 10 August 1998 was admissible.

In *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor* [2000] 3 CLJ 73, Jeffrey Tan, J did not follow *Arab-Malaysian Finance, supra,* and *Ban Hin Lee Bank Bhd, supra,* but instead held that an affidavit affirmed on 29 September 1998 in support of an originating summons issued on 30 September was not a nullity and therefore admissible.

In *Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79, Selventhiranathan, J held that an affidavit affirmed on 17 May 1994 in support of an originating summons filed on 30 May 1994 was admissible. *Kewangan Bersatu Bhd, supra,* was followed by Suriyadi Halim Omar, J in *Yip Chee Seng Sons Sdn Bhd v. Ornaconstruction Corporation Sdn. Bhd.* [1999] 6 CLJ 550; and by Chin Foo Yen, J (as he then was) in *Selvarani KV Velusamy v. Sundara Raja Kasamoorthie* [1999] 6 CLJ 477. Faiza Thamby Chik, J in *Lee Thye (Sebagai Presiden dan Pemegang Jawatan Selangor Yan Keng Benevolent Dramatic Association) v. Tan Sri Ngan Ching Wen (Sebagai Presiden dan Pemegang Jawatan Dewan Perhimpunan China Selangor)* [1999] 7 CLJ 95, observed that the decision in *Arab-Malaysian Finance, supra,* should be viewed with caution, particularly the conclusion that an affidavit affirmed before the filing of an originating summons is a nullity.

Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173 cited for the defendant concerned the affirmation of an affidavit verifying a petition for the winding-up of a company and r. 26 of the Companies (Winding-up) Rules 1972 specifically provides that an affidavit verifying a petition must be "sworn after and filed within four days after the petition is presented". That case is not relevant to the issue of whether an affidavit in support of the originating summons must be affirmed only after the filing of the originating summons. In the context of the law of winding-up of a company, that case has also not been followed or had been distinguished: *Sam Hin Timber Trading Company v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 CLJ 269; [1983] CLJ (Rep) 838 (pp. 291-293 of PBA 2) per Peh Swee Chin J (later FCJ) and *Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise* [1988] 1 MLJ 201 per Lim Beng Choon J (as he then was). *Chin Yoon Timber Co., supra,* is in my view of no assistance to the defendant here.

Sobri bin Arshad, supra, also relied on by the defendant, concerned the affirmation of an affidavit verifying petition in bankruptcy proceedings and s. 6 of the Bankruptcy Act 1967 and r. 106 of the Bankruptcy Rules 1969 specifically provide that the creditor's petition must be verified by an affidavit of the creditor with regard to the facts stated in the petition. That case is again not relevant to the issue of whether an affidavit in support of the originating summons must be affirmed only after the filing of the originating summons. Further, in *Kewangan Bersatu Bhd, supra,* the learned judge had decided not to follow it and described it as "totally out of context" to the issue. In the context of the law of bankruptcy, *Sobri bin Arshad, supra,* had not been followed or had been distinguished: see *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 per VC George J (later JCA); *Re Lee Boon Hooi Ex Parte Tan Ket Huat* [1992] 4 CLJ 1903; [1992] 2 CLJ

(Rep) 699 (pp. 303-307 of PBA 2) per Mahadev Shankar J (later JCA); *Teoh Thean Peng v. D & C Leasing Sdn. Bhd.* [1993] 2 CLJ 665 per KC Vohrah J (now JCA) and *Re: Koh Kim Kuay, Ex Parte: MBf Finance Berhad* [1995] 2 CLJ 145 per VC George J (later JCA). *Sobri bin Arshad, supra*, therefore does not support defendant's contention.

Order 83 r. 2

The relevant provisions which the defendant contended that the plaintiff has breached *viz.* O. 83 r. 2(1) to (7) are reproduced as follows:

> 2(1) Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, any defendant fails to enter an appearance, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.
>
> This rule shall not be taken as affecting Order 28 rule 3, or rule 5(2), in so far as it requires any document to be served on, or notice given to, a defendant who has entered an appearance in the action.
>
> (2) Not less than 4 clear days before the day fixed for the first hearing of the originating summons the plaintiff must serve on the defendant a copy of the notice of appointment for the hearing and a copy of the affidavit in support of the summons.
>
> (3) Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the charged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.
>
> (4) Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at the hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.
>
> A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph (3).
>
> (5) Service under paragraph (2) or (4), and the manner in which it was effected, may be proved by a certificate signed by the plaintiff, if he sues in person, and otherwise by his solicitor.
>
> The certificate may be indorsed on the affidavit in support of the summons or, as the case may be, on any further affidavit intended to be used at an adjourned hearing.

(6) A copy of any exhibit to an affidavit need not accompany the copy of the affidavit served under paragraph (2) or (4).

(7) Where the plaintiff gives notice to the defendant under Order 3, rule 6, of his intention to proceed, service of the notice, and the manner in which it was effected, may be proved by a certificate signed as mentioned in paragraph (5).

Upon a careful reading of O. 83 r. 2(1), it is clear to me that O. 83 r. 2(2) to (7) would be applicable only where a defendant fails to enter an appearance, in which case the defendant must be served with:

(a) a notice of appointment for the first hearing and affidavit in support: O. 83 r. 2(2);

(b) a notice indorsed on the outside fold of the affidavit informing the defendant that the plaintiff intends to apply for an order for the delivery of possession of the property: O. 83 r. 2(3);

(c) a notice of appointment for the adjourned hearing and further affidavit: O. 83 r. 2(4); and

(d) a notice of intention to proceed under O. 3 r. 6: O. 83 r. 2(7).

Further, under O. 83 r. 2(5), the plaintiff may prove the service of notices of appointment or affidavits by way of a certificate of service signed by the plaintiff or the plaintiff's solicitors (rather than by affidavit of service as in the normal way).

In *OCBC Bank (Malaysia) Bhd v. Lean Seng Pottery Factory Sdn Bhd* [1999] 5 CLJ 529, the charge action was fixed for hearing on 7 October 1998 and the chargor's learned counsel appeared. The action was adjourned to 13 November 1998 when respective counsel for both parties appeared. Abdul Hamid Embong, J held, *inter alia*, that O. 83 r. 2(4) which requires the service on the defendant of a notice of appointment for the adjourned hearing and further affidavit does not apply here, but instead would only apply where the defendant had not entered an appearance, as in *Muniandy a/l Thamba Kaundan & Anor. v. Development & Commercial Bank Berhad & Anor.* [1996] 2 CLJ 586 FC; and *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd.* [1993] 1 CLJ 487. (See also *Multi-Purpose Bank Bhd, supra,* at p. 82 f).

In the instant case, the defendant has entered an appearance through its solicitors by way of a memorandum of appearance dated 22 July 1998. A notice of appointment to hear the originating summons dated 24 July 1998 was served on the defendant informing the defendant to attend the hearing of the originating summons on 24 August 1998. Learned counsel for the plaintiff

and the defendant have attended subsequent hearings without fail and have indeed diligently presented voluminous written submissions. No one was deprived of the right of being heard. In the circumstances, I am unable to see any substance or merit in the defendant's contention herein.

Order 83 r. 3

It is the defendant's case that the plaintiff must provide in the plaintiff's first affidavit all particulars under O. 83 r. 3(3). Upon a proper perusal of O. 83 r. 3(3), it seems clear to me that there is strictly no requirement in law that the first affidavit must include all the particulars such as:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalment in arrears at the date of the issue of the originating summons and at the date of the affidavit; and

(c) the amount due under the charge.

And under O. 83 r. 3(7), where the plaintiff's claim includes a claim for interest to judgment, the amount of a day's interest.

In *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608, the defendant claimed that the plaintiff had failed to provide the statutory particulars required under O. 83 r. 3 in the first affidavit in support of its application, *viz.*, the amount of the advance and the rate at which interest had been calculated. Mahadev Shankar, J (later JCA) held, *inter alia*, that the plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O. 83 rr. 1(1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Hence, the plaintiff's application was dismissed. The learned judge however added at p. 615A-C as follows:

> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order.

> Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

The principle enunciated above shows that the particulars under O. 83 r. 3(3) may be provided in the affidavit or affidavits before the final hearing. This was followed by Jeffrey Tan, J in *Multi-Purpose Bank, supra*, at p. 83f to 84c; and RK Nathan, J in *Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd* [2000] 1 CLJ 766.

Reverting to the facts in the instant case, there is no doubt that the plaintiff has provided the statutory particulars in all the affidavits filed herein eg:

1. the defendant had covenanted to pay to the plaintiff all outstanding principal under the term loan and bridging loan together with interest thereon under article II of the charges;

2. the defendant had breached the covenant to pay by failing to settle all outstanding principal under the term loan and bridging loan together with interest thereon;

3. despite demands including the Form 16D notices, the defendant had still failed to rectify its default under the charges by paying all outstanding principal under the term loan and bridging loan together with interest thereon, which are the sums secured under the charges, to the plaintiff; and

4. the aforesaid matters clearly show the circumstances giving rise to the plaintiff's right to possession as well as right to sell the properties in order to recover the sums due and owing by the defendant.

Further, pursuant to O. 83 r. 3(3), in the plaintiff's affidavit affirmed by one Ng Chee Wah on 1 March 2001, the plaintiff has stated, at para. 4 therein, that the amount of repayment is RM1,794,557.96, which consists of RM1,720,162.56 under the term loan and RM74,395.40 under the bridging loan. In the same affidavit, the plaintiff has also stated, at para. 4 therein, that the amount of interest in arrears at the date of issue of the originating summons, ie, 27 December 1997, is RM7,897,182.76, which consists of RM7,191,231.12 under the term loan and RM705,951.64 under the bridging loan; and in the same affidavit, the plaintiff has also stated, at para. 4 therein, that the amount of interest in arrears at the date of the affidavit, ie, 1 March 2001, is RM22,594,311.43, which consists of RM20,596,057.57 under the term loan and RM1,998,253.86 under the bridging loan.

It is to be noted that in the same affidavit, the plaintiff has stated that the total amount due under the charges at the date of hearing on 19 April 2001 is RM55,600,612.53, which consists of RM50,572,748 under the term loan and RM5,027,863.65 under the bridging loan.

The plaintiff has also complied with O. 83 r. 3(6) by way of affidavits in encls. (7), (10), (20), (24), (25), (27) and (31) on all the dates of hearing and such affidavits which have not been challenged by the defendant are deemed to have been admitted by the defendant: *Ng Hee Thoong & Anor. v. Public Bank Berhad* [1995] 1 CLJ 609 CA. In the context of O. 83 r. 3(3), it has been held that a bare denial of a debt is not enough. The defendant as a chargor has an onus if he denies the amount claimed to say how much he admits owing: per Mahadev Shankar, J (later JCA) in *Citibank NA, supra,* which was followed in *Multi-Purpose Bank Bhd, supra* and *Bangkok Bank Bhd, supra.*

The plaintiff has also, in compliance with O. 83 r. 3(7), stated the amount of a day's interest in the affidavit affirmed by one Ng Chee Wah on 1 March 2001 as RM20,734.95 under the term loan and RM2,021.26 under the bridging loan.

On the defendant's contention that the plaintiff had breached O. 83 r. 3(4), by failing to give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property, I am of the view that the plaintiff does not have to give particulars under O. 83 r. 3(4) as the delivery of vacant possession in prayer 6 of the originating summons is not vacant possession to the plaintiff but to the successful buyer of the properties at the auction: see *Perwira Affin Bank Berhad v. Tan Tian Ser* [1995] 2 CLJ 133. In that case, there was a similar prayer for vacant possession. Abdul Aziz bin Mohamad J held, *inter alia,* that the prayer is misconceived as the chargee who wants a sale cannot be wanting possession. His Lordship added that the vacant possession is to the buyer and not to the chargee so that O. 83 r. 3(4) does not apply.

In any event, the plaintiff has decided to abandon prayer 6 of the originating summons in which case the provision under O. 83 r. 3(4) is irrelevant. (See also *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC).

Illegality And Public Policy

In respect of the defendant's contention that the charges are illegal, null and void and hence unenforceable by reason of the plaintiff's contravention of ss. 16, 17, 21, 22 and 23 of the Moneylenders Act 1951 and ss. 24(a), (b), (e) and 25 of the Contracts Act 1950, and on ground of public policy, it is to be

observed that the ministry in question ie, the Ministry of Housing and Local Government had by a letter dated 17 December 1996 extended the period of exemption to the plaintiff pursuant to s. 2A(2) of the Moneylenders Act 1951 for a period of 15 years from 1 January 1991 to 31 December 2005 and would gazette the exemption which had been done *vide* P.U.(B) 144/1997. In the circumstances, there is no contravention of any provision of the Moneylenders Act 1951 to render the loans null and void.

In *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997, the main issue was whether a transaction made in breach of s. 67 of the Companies Act 1965 (ie, financial assistance in the purchase of its own shares) is unenforceable in law in view of s. 24 of the Contracts Act 1950. The Federal Court through the judgment of Edgar Joseph Jr. FCJ held, *inter alia*, that the courts in common law countries are slow in striking down commercial contracts.

A charge action arose in *The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn. Bhd.* [1995] 4 CLJ 300. Upon default committed by Feyen, CCB applied for orders for sale. Feyen sought to avoid repaying the loan on the ground that charges were illegal, void and unenforceable, being in breach of s. 133(1) of the Companies Act 1965 which forbids Feyen from providing security for loans taken by its directors from third parties. The High Court accepted Feyen's argument but the Federal Court allowed CCB's appeal, holding that admitting the defence of illegality would defeat a purposive interpretation of s. 133(1) and (5) of the Companies Act which is designed for the protection of Feyen, its shareholders and creditors from unlawful dissipation of its resources. The Federal Court stressed that to admit the defence of illegality to defeat CCB's application to enforce charges by way of an order for sale would provide a windfall gain to Feyen and impose substantial hardship upon CCB, and that the court would not be astute to lend its aid to enable Feyen to take advantage of its own default or breach to avoid the charges and escape its obligations thereunder.

On the same issue of public policy, the Federal Court in *Theresa Chong v. Kin Khoon & Co.* [1976] 2 MLJ 253 made it clear that the doctrine of public policy will not be extended beyond the classes of cases already covered by it and that no court can invent a new head of public policy. A similar sentiment was expressed by the Court of Appeal through the judgment of Mahadev Shankar in *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300, 348d to 349a.

Moratorium

Much has been mentioned about the moratorium on interest payment for every three months on a roll-over basis. This moratorium was the plaintiff's indulgence in response to the defendant's request for a six-month moratorium contained in the defendant's letter dated 3 October 1995. This indulgence certainly cannot be construed as excluding the defendant's liability to perform its obligations to repay all sums under the charges.

Form 16D Notices

The defendant's grievances pertain to the absence of any reason in Form 16D notices for all sums payable under the charges. After a careful perusal of the clauses contained in the charges, it is apparent to me that there is no such obligation on the part of the plaintiff as there is no dispute that the defendant despite the plaintiff's indulgence by way of moratorium has not performed its obligations to pay the principal, interest and all other sums due and payable under the charges, as cl. 7.1 in the charges says that the chargee may by written notice to the chargor declare the principal, interest and all other sums payable under the charges to be forthwith due and payable if the chargor fails to pay any sum due under the charges on the due date.

The defendant did not contradict or challenge the sums of RM26,697,812.09 under the term loan and RM2,614,453.70 under the bridging loan (as at 31 January 1997) due and owing by the defendant as per the ledgers and statements of account, which constitute conclusive evidence of indebtedness due and owing to the plaintiff: *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 1 CLJ 590 CA.

The plaintiff's Form 16D notices did in fact specify, *inter alia*, the breach in that the defendant has failed to pay the plaintiff all the sums due with interest until the date of the notices and further interest thereafter and at no time was there any reply whatsoever by the defendant to these notices. In the circumstances, I hold that the Form 16D notices have complied with s. 254 of the NLC: *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* HC, *supra; Bunbury Foods Proprietary Limited And Another v. National Bank of Australasia Limited And Another* [1983] 153 CLR 491; *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 HC.

It is interesting to note that in *Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Bhd.* [1987] 1 CLJ 383; [1987] CLJ (Rep) 486 Peh Swee Chin, J (later FCJ) following Barton, J in *Tan Kai Kok v. Thor Teik Seng* [1935] MLJ 91, held that even the failure by a chargee to specify in a notice of default, the time to remedy a breach is to be treated as an innocuous irregularity. The Privy Council in *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd.* [1986] 2 MLJ 253, held that the letter of demand which referred

to the breach simply as the failure to repay the principal and interest accrued by the charge was a sufficient specification. The global sum due on a single account secured by both charges there was held not to have prejudiced or misled the chargee and so did not invalidate the order for sale.

Land Acquisition

On the defendant's contention that the plaintiff had breached its duty of care to the defendant by failing to take steps to collect compensation until 4 February 2000 from the Wilayah Persekutuan Land Office in respect of the acquisition of part of the properties in two Forms H dated 27 April 1996, it is to be observed that after receiving the said two forms on 21 May 1996, the plaintiff had on 9 July 1996 accepted the offer for compensation, but the plaintiff managed to receive the compensation on 4 February 2000, while the defendant as the registered owner took no initiative to obtain the compensation.

In *Chuckmere Brick Co. Ltd. And Another v. Mutual Finance Ltd.* [1971] 1 Ch. 949 CA, there was a sale of property by the mortgagee at an undervalue, while *Standard Chartered Bank Ltd v. Walker and Another* [1982] 3 All ER 938 CA concerned the sale by the receiver of the company's stock, also at an undervalue. The facts in these two authorities relied on by the defendant are not on all fours with the instant case, where there was no sale at an undervalue but a compulsory purchase by way of acquisition. That being the case, these two authorities are of no assistance to the defendant.

Penalty Or Excessive Interest

The defendant's complaint that the plaintiff's claim of interest is excessive and irrecoverable has to be examined in the light of s. 75 of the Contracts Act 1950 which is reproduced as follows:

> **75 Compensation for breach of contract where penalty stipulated for**
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

To invoke s. 75, *supra,* the defendant must establish that:

(1) the plaintiff's claim for interest is the amount to be paid in case of a breach of contract under the charges, as distinct from the amount which the defendant has to pay in any event independent of any breach under the charges; and

(2) if the plaintiff's claim for interest is the amount to be paid in case of a breach of contract under the charges, whether it was excessive in nature.

Plaintiff's claim for interest is provided for in cls. 3(a), (b), 3.2(a), (c) which merit reproduction as follows:

3. **INTEREST**

(a) The Chargor shall pay interest on the Term Loan or any part thereof from time to time outstanding at the rate Nine Point Five Percent (9.5%) per annum as well after as before judgment (hereinafter called "the ruling rate" which expression shall include such other rate as the Bank may from time to time by notice in writing stipulate) on monthly rests and such interest shall be paid by the Chargor to the Chargee by monthly payments ...

(b) Interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall henceforth bear interest at the ruling rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

3.2 **VARIATION OF INTEREST**

(a) Notwithstanding the provisions relating to the rate of interest as herein provided, or the ruling rate, the Chargor agrees and the Chargee is entitled at any time and from time to time vary the rate of interest as herein provided, or the ruling rate. ...

(b) ...

(c) The Chargee shall give notice of the rate of interest, or the ruling rate, to the Chargor but failure by the Chargee to give notice shall not prejudice or have the effect of invalidating any such variation. Notice by the chargee may take any form.

The plaintiff's claim for interest under cl. 3.1(a) of the charges, ie, at the rate of 9.5% per annum, is nothing unusual or objectionable under s. 75 of the Contracts Act 1950, as the defendant would have to pay the same to the plaintiff in any event for the loss of use of funds disbursed to the defendant independent of any breach of contract by the defendant under the charges. In *Realvest Properties Sdn. Bhd. v. The Co-operative Central Bank Limited (Under Receivership)* [1996] 3 CLJ 823 Peh Swee Chin FCJ (as he then was) in delivering the judgment of the Federal Court held that there is nothing unusual or anything objectionable for the 'starting rate' of 14.5% per annum provided in cl. 3.1 of the charge annexure there.

In addition, the plaintiff's claim for interest over and above the said 9.5% per annum is sustainable under cl. 3.2(a) thereof as the defendant has agreed that the plaintiff may vary the interest rate or the ruling rate at any time.

The plaintiff has under cl. 3(2)(c) thereof given notices of variation of interest to the defendant from time to time, as was shown in letters dated 24 November 1995 (9.75%), 1 March 1996 (10.25%), 30 May 1996 (10.75%), 1 August 1997 (11.25%), 29 November 1997 (11.75%), 31 December 1997 (13%) and 27 January 1998 (16.50%) ("Varied Rates").

The defendant's contention that it has no record of receipt of the notices of variation is immaterial in view of cl. 3.2(c) thereof which provides that any failure by the plaintiff to give notices of variation of interest shall not prejudice or have the effect of invalidating any such variation of interest.

Since the defendant has agreed to the Varied Rates, the question of excessive interest does not arise: *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 CA, which was followed by KC Vohrah, J (later JCA) in *Sogelease Advance (Malaysia) Sdn Bhd v. Jantsco Sdn Bhd & Ors* [2001] 5 CLJ 536.

In *Bhai Panna Singh v. Bhai Anjun Singh* [1929] AIR PC 179, the Privy Council established the requirement for the plaintiff to prove the damages suffered in the context of s. 74 of the Indian Contracts Act 1782 which is in *pari materia* with our s. 75, *supra.* In the circumstances, that decision does not render any assistance to the defendant. It is pertinent to restate the principle that in our country there is no difference between penalty and liquidated damages: per Thomson, J (later LP) in *S.S. Maniam v. The State of Perak* [1957] 23 MLJ 75 which was followed by the Court of Appeal in *Reliance Shipping & Travel Agencies Sdn. Bhd. v. Low Ban Siong* [1996] 2 CLJ 960.

In *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd, supra,* Lim Beng Choon, J found the plaintiff's demand for penalty interest to be wrongful, as the plaintiff has failed to comply with cl. 5 of the charge there which required a notice to be served on the defendant. In the case before me, the relevant notice of variation of interest has been served on the defendant in compliance with cl. 3.2(c) of the charges. Further, the charge in *Co-operative Central Bank Ltd (In Receivership), supra,* did not contain any clause to the effect that the plaintiff's failure to give defendant notice shall not prejudice the plaintiff's right, which was expressed in cl. 3.2(c) of the charges in the case before me. In *Arab-Malaysian Merchant Bank Berhad & 3 Ors. v. Court Square Pelita Sdn Bhd & 4 Ors.* [2000] 1 LNS 1, there was a provision for the variation of interest to be valid even if there was no notice, as in the instant case. Ian Chin, J came to the same conclusion, thereby distinguishing

Central Co-operative Bank Ltd (In Receivership), supra, and *Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 on the facts. In *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v. WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185, there was no express provision to the same effect as in cl. 3(2)(a) of the charges in the case before me and so may be distinguished accordingly.

The defendant's contention that the plaintiff's claim for interest is excessive and against public policy does not appear to have any merit as the said interest has been agreed by the plaintiff and the defendant, which has been incorporated in all the charges after proper legal advice and representation. No such complaint was raised by the defendant at the inception, approval and disbursement of the loans.

Nature Of Charge Action And Judge's Duty

The defendant's submission that there is a dispute of facts which should not be dealt with in the originating summons is, in my view, unmeritorious. There is not the slightest doubt that the matter before me is a charge action praying an order for sale and under O. 83 r. 2(1), it may be begun by writ or originating summons. It is an established practice and procedure in our courts that charge actions are almost invariably commenced and proceeded with by way of an originating summons, since such proceedings in particular the instant case pertain to the construction of the charge document and this mode of commencement provides a relatively swift and simple means of obtaining relief (see also *Malaysian High Court Practice* 1998 MLJ Desk Edn. para 7.1.2 p. 96-110). The nature, rights and obligations of the parties in such a charge action has been authoritatively stated with unrivalled clarity by Eusoff Chin SCJ (later CJ Malaysia) in the then Supreme Court in *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 as follows:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject.

In the present application for an order for sale, the burden of proof lies on the defendant to show the existence of cause to the contrary under s. 256(3) of the NLC. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 the Federal Court enunciated that the expression "cause to the contrary" in s. 256(3) of the NLC is limited to only the following three categories:

1. when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC;

2. when a chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and

3. when a chargor is able to demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The Federal Court gave a very narrow and restrictive interpretation of the words "cause to the contrary" and explained their reasons as follows:

> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s. 256(3) of the code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of a security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s. 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realise their security through an order for sale. Financial institutions would then become reluctant to lend money to *bona fide* entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

The Federal Court stated the approach to be taken by a judge in hearing an application under s. 256 of the NLC is as follows:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.
>
> ...
>
> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action *in personam* that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

In *Standard Chartered Bank Malaysia v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168, I applied the aforesaid principles of the Federal Court and not the Court of Appeal, as was stated in my said judgment.

Result

Defendant's learned counsel has done his competent best and attempted to show that there exist "causes to the contrary" and therefore an order for sale ought not to be granted. On the aforesaid grounds, I am constrained to conclude that the defendant has failed to establish any cause to the contrary. I therefore make an order for sale in terms of encl. (2) herein to realise the sum of RM62,044,170.45 outstanding on 7 January 2002 based on the affidavit affirmed by one En. Lee Kim Mun on 27 December 2001.